Basin Frozen Foods, Inc. *and* Teamsters, Food Processing Employees, Public Employees, Warehousemen and Helpers Local Union No. 760, affiliated with International Brotherhood of Teamsters, AFL–CIO.[1] Case 19–CA–21029

July 20, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On December 17, 1991, Administrative Law Judge Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order.

CONCLUSIONS OF LAW

1. By coercively interrogating employees about union support or union activities; by making threats to shut down the plant if the Union were to become the employees' representative for collective-bargaining purposes; and by encouraging employees to get their signed authorization cards back from the Union, the Respondent, Basin Frozen Foods, Inc., interfered with, restrained, and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act and thereby has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

2. By discharging Earl Wheelock because of his union activities, the Respondent, Basin Frozen Foods, Inc., has engaged in unfair labor practices within the meaning of Section 8(a)(3) and (1) of the Act.

3. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Basin Frozen Foods, Inc., Warden, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters Local 760 or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT encourage employees to get their signed authorization cards back from the Union.

WE WILL NOT threaten to shut down the plant if the employees select Teamsters Local 760 or any other union as their collective-bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Earl Wheelock immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits re-

[1] The name of the Charging Party has been changed to reflect the new official name of the International Union.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In sec. V of his decision, the judge incorrectly found that it was Company President Kevin Weber, rather than Plant Manager Don Vietz, who told Union Representative Harum at a July 26, 1990 meeting that he had ''just terminated somebody.'' This error does not affect our decision in this case.

[4] In agreeing with the judge's finding that the Respondent had knowledge of employee Earl Wheelock's union activity prior to his discharge on July 26, 1990, Member Oviatt does not rely on the Respondent's July 27 campaign letter to employees. In addition to the other evidence relied on by the judge to infer knowledge, Member Oviatt also relies on the pretextual nature of the discharge. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966).

Member Oviatt finds it unnecessary to pass on the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by interrogating employee Stansbury, because the finding is cumulative of other interrogations found to violate Sec. 8(a)(1).

sulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Earl Wheelock that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

BASIN FROZEN FOODS, INC.

James C. Sand, Esq., for the General Counsel.
Nels A. Hansen, Esq., of Ephrata, Washington, for the Respondent.
John P. Harum, Business Agent, of Moses Lake, Washington, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge. I heard this case in trial in Moses Lake, Washington, on April 24 and 25, 1991. It arose when Teamsters Local 760 (the Union) filed an unfair labor practice charge against Basin Frozen Foods, Inc. (the Respondent) on August 3, 1990 (all dates below are in 1990 unless I specify otherwise). After investigating, the Regional Director for Region 19 issued a complaint on February 22, 1991. The complaint, as amended at the trial, alleges that the Respondent discharged Earl Wheelock on July 26 because of his union activities, thereby violating Section 8(a)(3) of the Act, and, on that date and on other dates thereafter, its agents interrogated employees about their union activities, made shutdown threats, and made other statements tending to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7, thereby violating Section 8(a)(1). The Respondent admits that its operations are in commerce and affect commerce, and that the Board's jurisdiction is properly invoked; it denies all alleged wrongdoing.

I have studied the whole record[1] and the briefs filed by the General Counsel and the Respondent. I have considered the testimonial demeanor and performance of the witnesses, and have assessed the likelihoods inhering in the undisputed surrounding circumstances. Based on all of that, and more particularly on the findings and reasoning below, I will find that the Respondent violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. OVERVIEW; THE KNOWLEDGE ISSUE

Most of the dispositive facts are undisputed and can be narrated simply: Plant Manager Don Vietz discharged Earl Wheelock, a plant maintenance mechanic, within minutes after Wheelock arrived on shift at 2 p.m. on the afternoon of July 26. Vietz did this on instructions from the Respondent's president, Kevin Weber. The next day, Vietz furnished Wheelock with some paperwork—a typed ''reasons'' letter, dated July 27, purportedly signed by Weber and Vietz, and two handwritten memos, the latter bearing dates of ''June 12,'' and ''7–10,'' respectively, the first purportedly written by Wheelock's immediate supervisor, the second purportedly written by Vietz. Without more foundation (and none was forthcoming), the paperwork was incompetent hearsay as to any express or implicit ''assertions'' made within, but in the aggregate, the paperwork facially suggested that Weber had decided that the maintenance department needed ''strength[ening],'' and that Wheelock's departure would enhance this goal, in the light of his long-time record as a shirker with a bad ''attitude;'' moreover, one who had been ''warned,'' or ''talked-to'' about these problems on ''numerous'' prior occasions.

Wheelock had been centrally involved in the preceding 2–3 days in contacting the Union and in trying to organize support for the Union among the plant's approximately 180 production and maintenance employees. His personal organizational contacts were not shown to have been extensive; they were apparently limited to about a dozen employees, most of them fellow mechanics in the English-speaking maintenance crew, in a plant where a majority of the roughly 160 workers in production jobs spoke Spanish as a primary language.

Weber flatly denies knowing of any of these union activities before he instructed Vietz to fire Wheelock. Vietz, though still employed by the Respondent as plant manager, was not called to testify.

The timing of Wheelock's dismissal was tantalizingly close to the point when the Respondent admittedly received knowledge of the Union's organizational drive, apparently within minutes of when the Union's business agent, John (Jack) Harum, first met at the plant with Vietz, and later with Vietz and Weber together. But the details strongly suggest—and the General Counsel makes no contrary claim of fact—that Weber had already ordered Vietz to fire Wheelock, and Vietz *had* fired Wheelock, before the point when Harum arrived at the plant, or at least before the point when Harum's presence and status as the Union's agent became known to the Respondent's agents.[2] Thus, if knowledge of union ac-

[1] I grant the General Counsel's unopposed motion to correct the transcript.

[2] Wheelock stated that it was almost immediately after his arrival at the plant at his 2 p.m. shift start that his supervisor, Rick Edwards, told him that Don Vietz wanted to see him, whereupon Wheelock went up to Vietz' office and was quickly told by Vietz that he was being discharged. In a note he wrote no more than 30 minutes later (G.C. Exh. 3), Wheelock recorded ''2:05 pm'' as the time of his having ''got fired.'' Harum stated that he arrived at the plant ''shortly after 2:00'' and then went to the office area and asked for Vietz, but then ''waited probably ten minutes or so before [Vietz] had time to visit with me.'' (Harum and Vietz were previously unacquainted, according to Harum; there is no reason on this record to suppose that Harum was known to anyone in the plant as the Union's agent other than to the 5–6 employees who had attended a meeting in Harum's office in a nearby town the day before.) Harum then told Vietz that he was organizing the plant, and gave Vietz a letter to that effect, whereupon Vietz ''took one look at it and jumped up and left his office'' for a ''ten to twenty minutes'' period before returning and escorting Harum to Weber's office. During the following meeting in Weber's office, according to Harum, Weber said that ''he had just recently terminated somebody that day.'' (Harum said that Weber did not name Wheelock; neither did Wheelock's name figure in any other part of these meetings.) Even if Harum's initial arrival ''shortly'' after 2 p.m. means that he arrived only within a matter of ''minutes'' after that point, it is likely from Wheelock's account that this happened only after the point when Wheelock had already been summoned to Vietz' office to be

Continued

tivities infected Weber's consciousness before he instructed Vietz to fire Wheelock, that knowledge must have preceded Harum's arrival at the plant on the July 26, and, indeed, must have preceded Wheelock's own arrival at the plant that day.

Under *Wright Line*,[3] for the General Counsel to prevail on the 8(a)(3) count concerning Wheelock's discharge, he must first make,

> a prima facie showing sufficient to support the inference that protected conduct [here, union activities] was a ''motivating factor'' in the employer's decision [here, to fire Wheelock].[4]

But,

> Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[5]

As I elaborate below, the record rather clearly reveals most of the ''prima facie'' elements of a union-motivated discharge (Wheelock's union activities were followed swiftly by his discharge, in this case a curiously-delivered one at that, and company agents committed near-contemporaneous 8(a)(1) violations or made other statements revealing antiunion ''animus''). What is not so readily apparent, however, is the ''company knowledge of union activities'' element. Thus, there is no direct evidence that *any* agent of the Respondent knew of the union effort, much less of Wheelock's role in it, at any point before Harum's meetings with Vietz and Weber on July 26, after Vietz had already fired Wheelock. And, without some basis for finding ''knowledge,'' it cannot be found, prima facie, that Wheelock's union activities were a ''motivating factor'' in the Respondent's ''decision'' to fire him, and the 8(a)(3) count cannot survive.[6]

Not disputing any of this, the General Counsel relies on a variety of circumstantial factors which, he argues, cumulatively support an inferential finding that the Respondent knew of Wheelock's union activities before it fired him. Included among many such circumstances examined during the trial by the General Counsel, and pondered at length by him on brief, is the ''social structure of this plant and community.'' I treat it as necessary deadwood-clearing to dispose of such claims at the outset.

On brief, the General Counsel makes a number of statements similar to this one:

> Many of these people live in [a] very small town, where Anglo/Hispanic distinctions are presumably still at least to a degree relevant.

And he places emphasis on a supposed,

> . . . pattern, in the plant, if not the community as a whole, whereby social communication does tend to flow predominantly along linguistic lines as one might expect it would.

And such claims comprise only the airy initial premises of an argument ultimately directed at persuading us that, because of the existence of ''two cultures'' within this ''large plant,'' the ''small plant doctrine'' somehow may properly be brought to bear in analyzing the ''company knowledge'' issue.[7]

Even before I examine these premises more closely, I must observe that the ''small plant [knowledge] doctrine,'' although traditionally so labeled by the Board and the courts, is not so much ''doctrine''[8] as it is a permissible—but never mandated—inference which may be drawn from the size of the plant population.[9] It is also apparently a disfavored rationale, standing alone.[10] The General Counsel has cited no case, and I have discovered none, in which the Board has relied on the ''small plant doctrine'' as the sole basis for finding knowledge.[11] Moreover, the ''doctrine'' would be of du-

---

informed of his termination. Also, Harum's account shows that Harum waited at least 10 more minutes after his arrival before meeting with Vietz and then disclosing his identity and union purpose. In all these circumstances it is nearly impossible that Harum's appearance at the plant could have itself become the trigger for Wheelock's discharge, itself a fait accompli by ''2:05pm,'' according to Wheelock's contemporaneously recorded recollection.

[3] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affg. *Wright Line* tests.

[4] 251 NLRB at 1089.

[5] Ibid. And see fn. 14, appended to the above-quoted text:

> . . . in those instances where . . . the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. Whether that ''cause'' was the straw that broke the camel's back or a bullet between the eyes, if it were enough to determine events, it is enough to come within the proscription of the Act.

[6] E.g., *American Postal Workers (Postal Service)*, 278 NLRB 751, 752–753 (1986).

[7] See colloquy at Tr. 161:16–162:9, pursued at Tr. 204:21–207:14, ending with this exchange:

> JUDGE NELSON: . . . This is an attempt, I think, to twist the small plant notion by making a large plant into a small plant by pointing out that there were two different cultures within the plant.
>
> MR. SAND: That is precisely true, your Honor.

[8] Webster: ''doctrine. . . . 1. Archaic. Teaching, instruction. 2. That which is taught; a principle, or body of principals, in any branch of knowledge; tenet; dogma; principle of faith.''

[9] E.g., *Famet, Inc.*, 202 NLRB 409 (1972); enfd. in pertinent part 490 F.2d 293, 295–296 (9th Cir. 1973); *NLRB v. Mid-States Sportswear*, 412 F.2d 537, 539–540 (5th Cir. 1969); *Wiese Plow Welding Co.*, 123 NLRB 616, 618 (1959).

[10] See, e.g., *NLRB v. Mid-States Sportswear*, supra, 412 F.2d at 540:

> reliance upon the small plant doctrine alone is insufficient proof of knowledge of union activity.

[11] *Coral Gables Convalescent Home*, 234 NLRB 1198 (1978), may suggest to the contrary: There, the Board, in obiter dicta (''assuming arguendo,'' etc.) appeared to say that the smallness of the plant was enough to establish knowledge. But the Board had already found as fact that employer agents knew of union activities at critical times. Id. Moreover, the Board's arguendo rationale was itself not linked solely to the ''smallness'' of the plant; rather, the Board referred to a unique mix of facts enabling a finding that the union activities were carried on openly, (i.e., ''were carried on in such a manner, or at times that in the normal course of events, Respondent must have known about them.'' Ibid., and cases cited), thereby conforming to the *Hadley Mfg.* ''proviso'' (see next fn.) to the ''small plant doctrine.''

bious value to the General Counsel even if this were a ''small plant'' situation.[12]

All that aside, the record contains only a frail testimonial basis for the sociocultural generalizations which constitute the General Counsel's starting premises.[13] And the generalization about ''patterns . . . [of] social communication . . . predominantly along linguistic lines'' is a trivial truth.[14] I remain fundamentally unpersuaded that the existence of a supposed ''two-culture'' plant makes it more likely that Weber had pre-discharge knowledge of Wheelock's union activities than would have been the case if the 180 employees in the plant, and all of Warden's inhabitants, had been English-speaking ''Anglos.'' The General Counsel's efforts to treat the majority Latino work force as if it did not exist, as if those workers were *desaparecidos*, cannot seriously be countenanced.[15] Simply put, the ''two [supposed] cultures'' do not turn this large plant into a small plant; therefore, the

[12] If, contrary to fact, the Respondent's plant were truly a ''small'' one, this would not be enough to establish that the Respondent knew of Wheelock's union activities before it fired him. Thus, in *Hadley Mfg. Corp*., 108 NLRB 1641, 1659 (1954), the Board held (my emphasis):

> The mere fact that [the employer's] plant is of a small size does not permit a finding that [the employer] had knowledge of the union activities of *specific employees, absent supporting evidence that the union activities were carried on in such a manner, or at times that in the normal course of events, [the employer] must have known about them*.

See also, e.g., *NLRB v. Mid-States Sportswear*, supra, 412 F.2d at 540, quoting *NLRB v. Joseph Antell, Inc*., 358 F.2d 880 (1st Cir. 1966) (my emphasis):

> smallness . . . may be material, but only to the extent that it may be shown to have made it likely that the employer had observed the activity in question. . . . This can have no application to an off-hour, off-the premises meeting . . . .''

To similar effect: *W. W. Grainger, Inc*., 255 NLRB 1106 fn. 4 (1981); *A to Z Portion Meats*, 238 NLRB 643 (1978), enf. denied 643 F.2d 390 (6th Cir. 1981). Thus, in order to vitalize the inference of knowledge, ''openness'' of union activities seems to be required, even in a small plant. And here, as I elaborate below, it is quite open to question just how ''open'' Wheelock and the other handful of union adherents were in conducting their union activities.

[13] Weber acknowledged during less-than-precise examination by the General Counsel that a ''relatively high percentage'' of the plant's work force are primarily Spanish-speakers, most of these in general labor jobs on the production side. Weber likewise acknowledged that a ''majority'' of the production and refrigeration mechanics in the maintenance crew are primarily English-speakers, as are all of the supervisory and managerial personnel. Other testimony is to similar effect, but sometimes tends to confuse the issue by implicitly presuming, contrary to common experience, that workers of Latino or Hispanic ethnicity are not ''primarily'' English-speakers. (And see Stansbury, who undermined the General Counsel's premises when he said, ''Well, they're friendly. Everybody's friendly, but the whites talk, and the Mexicans talk, yeah.'') In any case, the record does not allow a meaningful finding as to the total number of primarily English-speakers in the plant. Evidently, the witnesses agree that the number is less than a ''majority,'' but that is about as far as I would go on that point. (The General Counsel characterizes the total as ''relatively small,'' (G.C. Br. 9), immediately adding that the number may be anywhere between ''18 to 54 depending on the estimate one uses, with most of those falling down around 27.'' The General Counsel does not document these numerical observations with citations to the record, and I do not adopt them.) As to ethnic/linguistic breakdowns among the 1500–2000 inhabitants of the town of Warden, the record is even less meaningful. Weber expressed doubt that a ''majority'' of Warden's population was Hispanic/Latino. According to employee Gaddes, however, Latinos comprise ''about 75 percent'' of Warden's population. In any case, nothing in Gaddes' testimony would show her to be competent in assessing how many of these are ''primarily'' Spanish-speakers.

[14] It is hardly remarkable that people who don't speak the same language don't tend to ''communicate'' very much. What remains murky is how this ''language barrier'' phenomenon contributes to a likelihood that Weber knew that Wheelock was organizing for the Union before he instructed Vietz to fire him.

[15] The precise social and cultural and behavioral assumptions underlying the General Counsel's claims in this regard are hard to detect, and, to the extent he allows us any insights into his thinking at all, his ultimate assumptions are plainly dubious. This is how he develops the ''point'' on brief (pp. 8–9; my emphasis):

> In this context, it is appropriate to consider the testimony about the social structure of this plant and community. . . . Between fifty and seventy-five percent of that population is Hispanic, and, at the plant, the Hispanic population is between 70 and 90% depending upon the estimator. The *point* is that this leaves a relatively small population of individuals who are Anglos, or, as the General Counsel would have preferred to couch it, people for whom English is the primary rather than the second [I know what ''primary'' means] language.

I'm still not sure of the ''point.'' But the General Counsel may yet be warming to it, for he says next:

> Furthermore, it is established that there is a pattern, at least in this plant if not in the community as a whole, whereby social communication does tend to flow predominantly along linguistic lines as one might expect it would.

It is self-evident that people tend to ''communicat[e] . . . along linguistic lines,'' and therefore do not tend to ''communicate'' with people whose language they can't speak. I still haven't gotten the point, and neither, apparently, has the General Counsel yet truly gotten to it, for it is only in his next passage that he seems to reach it. Thus (my emphasis):

> While this factor [apparently the ''Anglo/Hispanic distinction'' factor], in and of itself, does not demonstrate that English-speaking rank-and-file employees would necessarily converse with the English-speaking managers, *it certainly would make it more likely that a union organizing drive amongst the relatively small number of English speakers . . . would more naturally flow to the ears of managers, particularly low-level managers.*

I see: Rather than being an obstacle to the diffusion of information, in this case, the ''language barrier'' somehow invites a presumption that transmission of such knowledge would be *accelerated*—apparently because English-speaking workers ''certainly'' are ''more likely'' in a two-culture plant of 180 workers to transmit information about union activities to their English-speaking bosses than those same workers would be if the 180-person plant had been populated entirely by English-speakers. Why is this ''certainly . . . more likely?'' I'm still not sure. I think the General Counsel is trying to say without saying so that some kind of ''cultural solidarity'' among the Anglo workers and supervisors would somehow transcend ''rank-and-file solidarity,'' and thus would ''certainly . . . more likely'' drive the Anglo workers to share knowledge of union activities with those supervisors than would be the case in an all-Anglo plant. (And never mind that the organizing activities here were confined almost entirely within the group of Anglo mechanics) These are intriguing sociocultural notions, but they are not part of the firmament of common knowledge. Indeed, this is pseudoscience, the rankest kind of speculation dressed up in the language of the social and behavioral sciences, but entirely lacking in scientifically developed evidence sufficient to justify such speculation, much less to justify the ultimate claim lurking beneath all this speculation—that the Latinos do not ''count'' for purposes of a ''small plant'' analysis.

''small plant doctrine'' is useless to an analysis of the ''knowledge'' issue in this case.

Neither will it be necessary to resort to these and similarly ''speculative scenario[s]'' advanced by the General Counsel[16] to find such pre-discharge knowledge. We need not be *naif*,[17] and, as I will elaborate in due course, such knowledge can be found more readily by drawing reasonable inferences from Weber's ''attorney'' remarks to Harum on July 26, from the independently curious circumstances associated with Wheelock's discharge and the paperwork which he received from Vietz on July 27, and, to a lesser degree, from Weber's issuance that same date of a polished, four-page antiunion tract, authored elsewhere, then reproduced on the Respondent's letterhead, and published in *English* only.

II. EMPLOYMENT SETTING; MAIN ACTORS

The Respondent, a Washington corporation, processes potatoes into frozen hash-browns at its plant in Warden, a small town (population 1500–2000) in eastern Washington. Kevin Weber is the Respondent's president and part-owner,[18] and is in overall charge at the plant day-to-day. The plant operates throughout the year, nearly 24 hours a day (in July, it operated two 10-hour production shifts, with intermediate ''defrost time'' between night and morning shifts), at least 5 days a week. It uses about 160 production employees, directly supervised by shift supervisors (Angel Villa, George Davis, Ray Bryant), who report to production manager Gary Hoffman. A separate crew of about 20 maintenance and refrigeration mechanics and technicians are supervised, depending on their specific function, either by Refrigeration Supervisor Jerry McCanlis, or by Frederick (Rick) Edwards, in charge of maintaining and repairing production machinery. Both McCanlis and Edwards report to ''plant manager'' Don Vietz.

Alleged discriminatee Earl Wheelock worked on production machinery and was nominally supervised at material times by Edwards, although Edwards' shift and Wheelock's own did not often coincide, but merely overlapped,[19] and Wheelock often took assignments from production supervisors concerning needed work on production equipment.

III. THE UNION CAMPAIGN; THE ''OPENNESS'' OF WHEELOCK'S ROLE

I here rely centrally on Wheelock's credibly narrated and uncontradicted account, as it was echoed and supplemented by the Union's business agent, Harum, and by other employees called as the General Counsel's witnesses: On July 23, spurred by a recent company discontinuance of a ''bonus'' arrangement, Wheelock and up to six other maintenance employees met commonly as their shifts overlapped in the afternoon;[20] they agreed that one of them should make contact with the Union. Wheelock undertook the job, because ''everybody [else] had something to do the next day.''

On the morning of July 24, Wheelock drove to the Union's offices in Moses Lake, some 15 miles from Warden, where he met with Harum and received a packet of authorization cards and informational brochures concerning representation elections. Wheelock and Harum made arrangements for a followup meeting to be held the next day at the Union's office, where Wheelock was to bring with him as many other employees as he could.

Wheelock returned to the plant on the afternoon of July 24, and, again during a common shift overlap, met with the same maintenance employees who had convened the day before, and gave each of them one or more authorization cards. At intervals, on breaks or at other times during the balance of the shift, Wheelock talked one-on-one with an uncertain number of additional employees, all English-speaking production or refrigeration mechanics.[21]

On July 25, Wheelock and about four other employees traveled to the Union's offices, meeting again with Harum. An uncertain number of signed cards were returned to Harum. After the meeting, some of the attendees took other blank cards and continued, along with Wheelock, to make contacts with fellow employees, again mostly with employees in the maintenance department. Wheelock ''handed out cards to several people'' (apparently, from the names he named, this totaled about), on the swing shift of July 25. While he focused on maintenance employees, he also personally made contact with three production workers, Lorna Gaddes, a packaging machine operator, and two employees (''Victor'' [ ], and Eddie Navarro) who worked on different shifts in the ''Hooper Room,'' on a vacuum pack machine called the ''Hooper.'' He furnished Victor with union brochures; he gave extra cards to Navarro directly; after speak-

[16] ''Speculative scenario'' is the General Counsel's expression (G.C. Br. 31), used to describe an interpretation of Wheelock's discharge in which the union drive ''was an embarrassment to Vietz since it was coming almost entirely out of his small department, and there *may well have been* an element of resentment toward Wheelock for stabbing Vietz in the back . . . .'' (The General Counsel's brief is studded with ''may well have[s]'' and similar formulations. See, e.g., p. 9: ''Edwards was just up from the ranks in May, and may well have continued to have close connections with other mechanics.'') I have in mind also the General Counsel's attempts—on a superficial testimonial record—to posit the existence of a high-speed ''rumor-mill'' in the plant, or to claim that Wheelock's union activities were conducted ''openly'' (both of which points I return to briefly elsewhere below). Neither do these circumstances take on probative dignity by being lumped together, as the General Counsel does in another passage (at p. 10; my emphasis):

> General Counsel does not ask for any rote application of ''small shop'' analysis, but does believe it appropriate to note the *small town atmosphere*, the *relatively small size* of the *English speaking work force, its language commonality with management*, and the *recognized tendency of the two language groups* to remain *separate in social contact; as well as the nature of the plant's rumor mill in general, and* the *openness* of the organizing campaign with Wheelock identified as its leader in particular, when evaluating the circumstantial evidence of knowledge in this case.

[17] *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

[18] Other corporate officials include Weber's father and brother-in-law. Weber's group formed the corporation for the purpose of acquiring the plant's assets from a former operator who had, in turn, bought the assets from a previous owner, who had become bankrupt. The Respondent corporation took over the plant in July 1989.

[19] From Weber's testimony at Tr. 318–319, it appears that, unlike production workers, maintenance work was divided into three daily shifts.

[20] At relevant times, Wheelock worked a 2 p.m. to 10 p.m. shift.

[21] Wheelock estimated that he ''talked to'' a ''total'' of ''probably about ten or a dozen'' employees during his shift on July 24. What is unclear is whether this ''total'' was in addition to, or simply included, the group of about six mechanics whom he had met with initially at the start of the shift.

ing with Gaddes, he slipped extra cards into Gaddes' car, in the parking lot.

The testimony does not easily allow findings which would support the General Counsel's claims that Wheelock's (or other employees') union activities were conducted ''openly.'' Indeed, the record made by the General Counsel is remarkable for its ambiguity about the degree of ''openness'' (or ''secretiveness'') in which these April 24–25 organizing contacts may have taken place. Wheelock is vague about the circumstances, and provides no basis for believing that his own contacts with other employees were such as to be noticeable by a supervisor.[22] Two mechanics whom Wheelock had originally enlisted as union supporters, Mike Keeling and Forrest Stansbury, were equally vague about details, but said summarily that the organizing activity was a ''common'' subject among the (English-speaking) employees they associated with on breaks or during work hours. Again, however, their testimony would not permit a finding that any supervisor was present during any such discussions. Moreover, as to Wheelock's prominence in these rank-and-file discussions, Stansbury and Keeling paint slightly different pictures, both of them quite indistinct. Stansbury was asked (leadingly) by the General Counsel, ''did you hear Mr. Wheelock's name used again as being the organizer?'' He replied,

> Yeah, because they had said if you wanted to do it, people could . . . talk with Earl.

Keeling, however, in response to a similar question from the General Counsel, denied that he had ''mention[ed] Earl Wheelock's role in the organizing,'' during his own discussions with other employees (apparently all of these were with refrigeration mechanics). And he never directly answered a referentially vague question put to him immediately afterward by the General Counsel, as to whether Keeling recalled ''*that* being discussed by other people.'' (Keeling replied, ''Well, the gossip in the plant, you know, you only had to say it to one person and everybody knew it.'')[23]

In summary, about a dozen employees at a minimum, and perhaps an uncertain number of others, were shown to know enough about Wheelock's union activities to have served as potential vectors of transmission of that knowledge to one or more company agents. But none were shown to have done so before Wheelock was fired. And it is less than evident that union activities by Wheelock and others were being conducted so openly that they would independently be observable by company supervisors or managers. Therefore, we must either rely on a presumed ''rumor mill'' as the source of the needed company knowledge, or we must find evidence of such knowledge elsewhere, or not at all.

[22] Production maintenance workers had no fixed worksite; their jobs required them to rove the plant.

[23] Here, I observe that it is not obvious how this could be so, given the the General Counsel's efforts to establish the existence of ''linguistic'' and ''cultural'' barriers within the plant population. This is only one of the ways that the General Counsel's focus on such matters only served to undermine some of his theories and speculations about how the employer acquired ''knowledge'' of the organizing effort.

IV. WHEELOCK'S RECENT EMPLOYMENT HISTORY AND JULY 26 DISCHARGE

There is no dispute that Company President Weber had virtually decided to fire Wheelock as early as on or about July 10, nearly 2 weeks before the first whisper of any union interest among any employees. Wheelock admits that Don Vietz told him at about that time that Weber had wanted to fire him, because Weber was ''pissed'' that Wheelock had ''disappeared'' while Weber himself was involved in an awkward welding repair on a broken ''piler'' machine. But Wheelock testified without contradiction (indeed Weber's testimony is harmonious) that, as a result of Wheelock's explanation for his alleged ''disappearance'' during the piler repair, Vietz went to bat for Wheelock, reporting to Weber that Wheelock showed an appropriately improved ''attitude.'' Weber admittedly followed Vietz' recommendation to give Wheelock ''another chance,'' and Vietz reported this back to Wheelock. Thereafter, according to Wheelock, no further incident arose as far as he was aware which might have rekindled any management displeasure with his work or with his ''attitude.''

On July 26, Wheelock arrived for work at 2 p.m., and was told by Maintenance Supervisor Rick Edwards that Don Vietz wanted to see him.[24] Wheelock immediately walked upstairs from the plant floor to Vietz' office, where Vietz told Wheelock that Kevin Weber and his father had decided to terminate Wheelock, mentioning something about a wish to ''upgrade'' the department, and about Wheelock's lacking an ''upbeat attitude.'' Wheelock asked for his paycheck. Vietz replied that the company would first have to inventory Wheelock's toolbox and make any necessary deductions for missing tools, but that Wheelock could return the next day for his paycheck.

V. WEBER'S JULY 26 MEETING WITH HARUM

A. *Facts*

As partly noted earlier (at fn. 2), Harum's undenied testimony shows that, apparently on the heels of discharging Wheelock, Vietz found Harum waiting for him in the reception area, and then met with Harum long enough to read a ''letter'' which Harum presented announcing that the Union ''was in the process of organizing the plant.''[25] The meeting later adjourned to Weber's office, where Harum spoke with both Vietz and Weber together. I found Harum to be an apparently candid witness, and I credit his account here, even though it is not entirely harmonious with Weber's own fragmentary references to the same incident.[26]

Harum recalled that, after relocating to Weber's office, he advised Weber that he ''was in the process of organizing the plant'' and was prepared to ''talk . . . about it'' if Weber

[24] I credit Wheelock's undenied testimony about all transactions with Edwards and Vietz.

[25] The letter is not in evidence.

[26] Again, the Respondent elected not to call Vietz as a witness, but relied on Weber for all explanations of surrounding circumstances. I was unimpressed with Weber's testimonial performance. He tended to resort to generalizations where specifics were called for, and he gave the appearance of discomfort when pressed for details, often contradicting himself or amending or shifting the focus of his prior testimony.

wanted to. Weber declared that this was the first he had heard of any union organizing going on. Harum further recalled, however, that Vietz at one point asked Harum, ''Who do you represent in the plant,'' and that Weber, claiming that his ''attorney'' had ''asked him to get those names,'' echoed this, asking ''who had signed bargaining cards.'' Harum replied that the names were ''confidential,'' and that he would not disclose them to anyone other than ''the people at the NLRB.'' At another point, Harum recalls that Weber volunteered that he had ''just terminated somebody.''[27] At some uncertain point, Weber also remarked that ''he had started the plant up and . . . guessed he could shut it down,'' whereupon Harum ''advised him that he shouldn't say that.''[28]

B. *Probative Significance*

As just noted, Weber made a shutdown threat, revealing antiunion ''animus.'' This is an element in the General Counsel's prima facie case, and the General Counsel cites it on brief for that purpose, but does not otherwise remark on what I find to be highly significant evidence that Weber *already* knew of the fledgling organizing drive—and of Wheelock's role in it—before Harum's arrival. Most blaringly revealing was Weber's statement to Harum explaining that his ''attorney'' had ''asked him to get the names'' of the people who had signed ''bargaining cards.'' Weber never contradicted Harum's account of this statement, although he was present throughout Harum's testimony.[29] The ''attorney'' reference is alone plain evidence that, before Harum's arrival, Weber anticipated it, or at least had enough prior knowledge about union organizing to have already made a call to his lawyer for advice about it. Thus, Weber was plainly dissembling when he told Harum on July 26 that he had no prior knowledge of the organizing, and when he repeated this claim at the trial.[30]

Separately, and, in context, suggesting Weber's knowledge not only of the union drive but of Wheelock's role in it, is Weber's otherwise inexplicable volunteering to Harum that he had ''just terminated somebody.'' He was clearly referring to Wheelock's discharge only minutes earlier, but what is not clear is what could have caused him to volunteer such information, so apparently irrelevant to the proven subjects of conversation—unless Weber *already* associated Wheelock in his own mind with the Union drive. Similar inferences may be drawn from Weber's seemingly gratuitous protests to Harum that he had been unaware of any organizing drive until Harum's arrival. In the absence of any explanation from Weber, I find that Weber's remarks to Harum strongly imply his prior knowledge of the organizing drive and of Wheelock's role in it. And this would be enough evidence of knowledge even if it were not for other circumstances, detailed below, which point in the same direction.

VI. THE JULY 27 CAMPAIGN LETTER

On July 27, the Respondent published a four-page letter on its own letterhead, addressed to ''All Employees[,] Subject: Union Authorization Cards.'' Its contents are familiar, and not challenged as containing any unlawful statements. It began, ''It appears that the Teamsters Union is distributing signature cards . . . .'' Over the course of several pages it argued, inter alia, that, ''A union is not an idealistic organization driven by moral and ethical beliefs . . . . A union is a *business* [emphsis in original] . . .''; and, ''In the last analysis, only the company pays your wages and provides you with benefits, not the union.'' It ended,

> Basin Frozen Foods has and will continue to provide competitive wages and benefits as long as our customers continue to support us by placing orders. After all, they pay our wages through their orders. As long as we remain competitive in our industry we will grow, prosper, and employ people. I ask that you examine the current situation carefully and make your decision based on logic rather than emotion. There are good reasons why union membership has declined in recent years and that they have lost most of their elections nationwide.

Weber did not disclose precisely when these tracts were ready for distribution to employees, but apparently to rebut any implication of predischarge knowledge, Weber's counsel asked him to explain their background and timing. Weber stated that he had called ''a friend'' shortly after Harum had paid his visit on the afternoon of July 26, and that the ''friend,''

> suggested that I call an attorney in the Seattle area, which I did. And he had this letter on file which he faxed to me. We put that on our letterhead and distributed it to the employees.

This was surprisingly fast work for what must have been a technically complicated editing and reproduction job, particularly where Weber never explained how it was that his frozen hash brown plant was technically equipped for such a job. I doubt that the letter could have been reproduced on company letterhead, appropriately edited to include local references, and otherwise have been ready for mass distribution

---

[27] Harum elaborated,

> He [Weber] never identified the individual he had terminated or anything.

[28] Weber specifically recalls this ''advice'' from Harum, a significant admission, given that Weber otherwise claims he made only a bland (and otherwise circumstantially inexplicable) comment to the effect that if the plant were in financial trouble, he would shut it down while there was still enough cash to pay currently due wages, rather than letting it become bankrupt, and leaving the employees with only hollow wage claims. I find that Weber specifically said what Harum reports on the subject of a ''shutdown.'' Consistent with my analysis of similar shutdown threats, infra, this would have been an unlawfully coercive ''threat'' under Sec. 8(a)(1), if uttered to an employee, and, even though no violation may be found in Weber's delivering of this threat to a nonemployee union agent, this in no way diminishes the antiunion ''animus'' implicit in such a statement.

[29] Weber's only reference to an ''attorney'' in his own testimony is in his description of events following Harum's departure, sometime around 3 p.m., when, he says, he called his attorney, Nels Hansen, and received ''advice'' similar to Harum's about the making of shutdown threats.

[30] A more creative witness in Weber's shoes might have tried to claim that he had called his attorney in the ''ten to twenty minutes'' period between Harum's meeting with Vietz and the point when Harum was summoned to Weber's office. Weber made no such attempt. The evidence of his revealing admission stands undenied *and* unexplained.

on July 27, unless Weber's knowledge of union organizing had antedated Harum's visit.

At least as significant is that the letter, addressed to ''All Employees,'' was in English only. Nothing in Harum's or Weber's own account of the April 26 meetings would allow a finding that *Harum* had let slip that prounion sentiment had emerged primarily in the English-speaking maintenance crew, much less that organizing was so far being largely confined to employees in that crew. And the plant was populated in the majority by Spanish-speakers. Evidently, Weber had somehow learned independently that the targets of his cautionary letter about signing union cards would be English-speakers. All of this suggests an independent source of intelligence which Weber not only failed to disclose, but the existence of which he stoutly denied.

VII. JULY 27: WHEELOCK'S RETURN TRIP TO VIETZ' OFFICE

A. *Facts*

On July 27, Wheelock returned, but was told by Vietz that his check was not ready yet. Wheelock then waited in the lobby for 90 minutes or more until Vietz summoned him, then gave him a final paycheck, together with a typed letter and two handwritten memos.

The typed letter, dated July 27, and bearing both Weber's and Vietz' purported signatures, stated:

> TO WHOM IT MAY CONCERN:
>
> EARL WHEELOCK HAS BEEN DISMISSED FROM BASIN FROZEN FOODS DUE TO THE FOLLOW [SIC] REASONS.
>
> 1. HIS LACK OF INTEREST IN THE PLANT.
>
> 2. HIS ATITUDE [SIC] AND LACK OF BEING ABLE TO GET ALONG WITH FELLOW WORKERS.
>
> 3. KEVIN WEBER, PRESIDENT HAD SAID THE MAINTANCE [SIC] DEPARTMENT HAD TO BE STRENGTHED [SIC] AND TO DISMISS EARL FOR EARLIER COMPLAINTS.

One of the handwritten memos contained the purported signature of Supervisor Rick Edwards, and bore the purported date, ''June 12, 1990.'' Written on notepad paper bearing a ''Pacific Potato Corp.'' advertising logo, this memo states in material part:

> Rick Edwards
> Maintance [sic] Supervisor
>
> Earl Wheelock has Been warned by myself [''about'' crossed out] at numerous times about his attitude and his ability to maintain the line[,] service the line when called for Breakdowns, not being able to work with co-employees during jobs!

The other handwritten memo (imprinted with a ''Fulton-Denver Company'' logo) bears the purported signature of Don Vietz, and the purported date, ''7–10–90.'' It states in material part,

> I talked with Earl Wheelock, about being more involved with our program[,] staying busy and about trying to hide away so he would not be seen! Several times Rick Edwards and other co [inserted above line] workers found Earl Wheelock [''Sitting'' or ''Setting'' crossed out] Siting [sic] in Hydratic Room doing nothing[.] Also talked to Earl Wheelock not walking away from a job when the management was doing his job!

B. *The Probative Significance of the Paperwork*

These papers were received into evidence only as writings given by Vietz to Wheelock on July 27; they were never otherwise qualified as having been written or signed by their purported authors, much less were the handwritten memos shown to have been prepared on or about their purported dates. Indeed, Weber, the only one of the three purported authors called to testify, does not indicate that he saw or considered the handwritten ''Rick Edwards'' and ''Don Vietz'' memos at any time before he decided to fire Wheelock. And Wheelock himself testified without contradiction that he had never before seen the handwritten memos; indeed, he generally expressed mystification as to what it was that the ''Rick Edwards'' memo might have been referring to in the period before ''June 12.'' And, concerning the ''Don Vietz'' memo, Wheelock explained that the only incident or incidents which matched up with the references in that note were all matters which Vietz had spoken about to Wheelock on or about July 10—in the immediate aftermath of the ''piler'' incident. But, as previously found, after Wheelock had explained himself on or about July 10, Vietz had reported to Weber that Wheelock's attitude'' seemed to show improvement, and, as a consequence, Weber had admittedly backed away from his declared wish to fire Wheelock, and had decided instead to give Wheelock ''another chance.''

Thus, in the light of all this, not only the ''Edwards'' memo, but the ''Vietz'' memo, too, facially addressed themselves to significantly dated events. And the typed ''REASONS'' letter did not otherwise clarify the picture, being itself entirely vague as to what it was that Wheelock had done to warrant the characterizations of him used in that letter. Indeed, the most conspicuous feature of the reasons letter is the *absence* of any specific charge that Wheelock had exhibited any ''lack of interest in the plant,'' or bad ''attitude,'' or inability to ''get along with fellow workers,'' at any *time* after July 10, when Weber had decided to give Wheelock ''another chance.''

Separately, I think the handwritten memos are almost certainly phonies—either as to their purported authors (particularly ''Rick Edwards''), or, at least, as to their purported dates of preparation. The handwriting in each memo is remarkably similar,[31] and so is the style.[32] Also revealing—and heightening the probability that either Vietz or Weber authored all three writings—is the coincidence that the typed reasons letter, purportedly signed by Vietz and Weber, misspells ''maintenance'' (''maintance'') in precisely the same way that the word is misspelled in the handwritten memo purportedly written by Edwards. The memos bear many other earmarks (perfunctory and generalized narrations concerning prior events, leaving no sense of timing or sequence) of a

[31] Compare, for example, the handwriting of Earl Wheelock's name in each memo; likewise, the handwriting of the name ''Rick Edwards'' in each memo; likewise the writing of ''his,'' and ''about,'' in each memo.

[32] Both memos resort to generalizations; they use similarly erratic punctuation and inappropriate capitalizations or failures to capitalize.

hasty and improvised post facto attempt to rationalize a decision already made. Certainly, they would have little utility as due-course business records. My suspicions are likewise aroused by the fact that the Respondent never called either Edwards or Vietz as witnesses, and the Respondent's counsel pointedly avoided questioning Weber about any foundational details associated with these three written items given to Wheelock on July 27.[33]

I thus reach a more obvious set of findings in all the known circumstances: While Wheelock waited for more than an hour in the reception area on July 27, Vietz and/or Weber hastily ''created'' the paperwork which Vietz then handed to Wheelock, along with his pay check. Alternatively, but less probably as I view it, the handwritten memos were, indeed, written on the dates indicated, and by the authors indicated. But, if so, they reflected relatively ''ancient history'' (obviously pre- ''June 12'' in the case of the ''Edwards'' memo, and no later than ''7–10'' in the case of ''the ''Vietz'' memo). In either scenario, the evidence does not aid the Respondent in the light of Weber's admitted decision on or about July 10 to give Wheelock ''another chance.'' Thus, whether ''created'' on July 27, or merely generated in due course at an earlier date, the memos—and the events they purport to describe—could not alone have caused Weber to decide to discharge Wheelock on July 27. Rather, in either case, the memos reflected, at best, afterthoughts on the Respondent's part, seemingly calculated only to camouflage that more recent behavior by Wheelock had actually precipitated Weber's decision to fire him.

Whether that ''recent behavior'' was Wheelock's more recent union activities, or was instead, as Weber insists, his more recent displays of poor work performance or ''attitude,'' is a question which might be answered now. But it is properly seen as a question more pertinent to the Respondent's *Wright Line* defense, and I will therefore delay answering it until my concluding discussions. I simply note here as relevant to a prima facie showing of discrimination the many facially curious circumstances surrounding the Respondent's communication to Wheelock of its decision to fire him, and the ''reasons'' therefor. Put simply, even before examining the proof eventually advanced by the Respondent in the trial, these circumstances facially reek of pretext, coverup, and ulterior motive. And this, coupled to the extraordinary timing of Wheelock's discharge, has a certain probative force of its own in affirmatively establishing predischarge knowledge.[34]

VIII. AFTERMATH; INTERROGATIONS AND OTHER EXPRESSIONS OF ''ANIMUS''

A preliminary note on credibility: The General Counsel called four witnesses (Mike Keeling, Don Edson, Steve Harder, William Washburn, and Forrest Stansbury) to support complaint counts charging Weber, Vietz, Production Manager Gary Hoffman, and Production Supervisor George Davis, with interrogations and/or shutdown threats. The Respondent called only Weber, Hoffman, and Davis to respond to this testimony; accordingly, the remarks attributed to Vietz stand undenied. I found the employee witnesses to be apparently candid and reasonably coherent. Weber, called adversely by the General Counsel during the initial stages of the trial, generally denied having made any union-related statements to employees, allowing only that,

> I had several people ask me about it [the Union]. I didn't call anybody to my office. I listened if people had something to say but I had no judgment to pass.

Later, after hearing some of the testimony summarized below, Weber was not so categorical in his denials, but offered what seemed to be improvised and improbable counterversions of some of the transactions described by the employee-witnesses. Davis and Hoffman, to the extent they specifically contested any of the employees' accounts, were similarly unpersuasive. I therefore rely on the employees' accounts, summarized below, for findings about each transaction.

A. *Davis-Keeling (July 26)*

Facts: At some point in the evening of July 26, after Wheelock's discharge, Davis approached Keeling in the plant and asked him (my emphasis), ''Do you know who else has been involved with the Union?'' Kelling simply replied, ''No.''

Conclusions: Keeling was not shown to have been an ''open and active'' union adherent within the meaning of *Rossmore House*.[35] This is not alone dispositive under

[33] Weber was never invited to provide any authenticating testimony concerning any of these writings. Thus, they were not even shown to have been ''records of a regularly conducted activity,'' within the hearsay exception contemplated by Fed.R.Evid. 803(6). Clearly, therefore, they are mere hearsay as to their contents, and have no independent tendency to establish that Wheelock was guilty of the alleged misconduct described in the memos, or that he was ''talked to'' or ''warned'' about any such misconduct. (Wheelock's admission that he had a conversation with Vietz around July 10 which roughly resembled the ''talk'' described in the ''Vietz'' memo is the only admissible evidence that such a ''talk'' occurred.) And, where Weber does not even claim that he relied on these memos (as distinguished from various face-to-face reports from these purported authors, detailed later), their only conceivable evidentiary value lies in the appearance they convey that they were hastily-contrived after the decision to fire Wheelock had already been reached.

[34] *Shattuck Denn Mining Co.*, supra, 362 F.2d at 470. See also, e.g., *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046, 1049 (1985), where the Board said:

> [W]e infer that the Respondent was aware of Slesnick's and Lee Porteus' support of the Union at the time they were discharged. The factors on which the judge relied—the timing of the discharges and the pretextual character of the Respondent's reasons—serve to enhance the reasonableness of inferring the Respondent's knowledge.

[35] *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This case teaches that mere ''casual'' questioning by a supervisor of an ''open'' union adherent about union-related matters will not alone violate Sec. 8(a)(1); rather, the Board will take ''all the circumstances'' into account in deciding, ''[w]hether . . . the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.'' 269 NLRB at 1177.

Sunnyvale Medical Clinic,[36] which applied *Rossmore House* more expansively, interpreting that case as,

> signal[ing] disapproval of a per se approach to allegedly unlawful *interrogations in general*, and toreturn to a case-by-case analysis which takes into account the circumstances surrounding as alleged interrogation and that does not ignore the reality of the workplace.[37]

Obviously, we are discouraged from summary, ''per se'' approaches. In finding this interrogation to be unlawfully coercive, I have been influenced by the following considerations: Davis' question was not shown to have been a natural outgrowth of some casual conversation, but apparently was a perfunctory demand for the names of all employees who supported the Union. The question also occurred in the context of an apparent contemporary pattern of similar interrogations by other supervisors or higher level company agents (including ed by Vietz, and Weber, himself), all detailed below. In addition, the ''who else'' question was an apparent reference to Wheelcock's termination earlier that day, and to the now-public knowledge that Wheelock had been the key in-house organizer.[38] Thus, an employee could easily take the ''who else'' question as not so much a question as a *message*, as a thinly-veiled, ''One down, how many to go?'' threat. I thus find that Davis' unsolicited ''who else'' interrogation had a natural tendency to interfere with, restrain, or coerce Keeling in his exercise of statutory rights. The Respondent, through Davis, thereby violated Section 8(a)(1).

B. *Hoffman-Keeling (July 26)*

Facts: The same evening, Keeling, a self-identified ''pretty good friend'' of Production Manager Hoffman, was in Hoffman's office, and, as Keeling put it,

> we were just talking. And he slipped it in. He wanted to know who else was involved with the union organizing.

Keeling quickly clarified that he and Hoffman had not been talking initially about the union, but, rather had been ''talking about other things'' before Hoffman's ''who else'' question.

Conclusions: The same reasoning applies here. The Respondent, through Hoffman, violated Section 8(a)(1).

C. *Hoffman-Edson (July 26 or 27)*

Facts: ''Within a day or two after'' Wheelock's discharge, mechanic Edson was alone in a break room with Hoffman. In the midst of talking about unrelated subjects, Edson reports that,

> [H]e [Hoffman] asked me if I knew anything about the union[,] and I said, no. I didn't. And he told me that he was upset because there was someone trying to bring in the union.

Conclusions: Nearly the same, although here, Hoffman did not ask ''who else.'' This is not sufficient mitigation given the unsolicited character of the question, and that it occurred as part of an apparent pattern of company attempts to gather intelligence, rather than being simply an expression of Hoffman's mere ''casual curiosity.'' The Respondent, through Hoffman, violated Section 8(a)(1).

D. *Vietz-Washburn (July 27)*

Facts: In the lunchroom, alone with Vietz, refrigeration mechanic Washburn asked Vietz ''if Earl got fired because of the union activity.'' Vietz said ''no,'' but, as the conversation progressed, Vietz opined that, ''if the union came in there, Kevin would have to close the plant down.'' On cross-examination, Washburn acknowledged that Vietz had also made some statement to the effect, ''[The plant has] been bankrupt like three times.'' Still later on cross, Washburn recalled that Vietz ''made it seem like that the plant would have to be shut down financially if a union came in.'' On redirect, Washburn elaborated that Vietz had said something to the effect that the Company, ''couldn't afford to pay the wages that other union members were getting and they would just close the plant down.''

Conclusions: An employer or its agent may not lawfully predict a plant shutdown as a consequence of unionization unless such predictions are ''carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control.'' *NLRB v. Gissel Packing Co*., 395 U.S. 575, 618–619 (1969). Even if Vietz' shutdown prediction to Washburn included a reference to the marginal profitability of the plant and included as well a reference to an inability on the Company's part to pay prevailing ''union'' wages, his prediction does not fall within the ''carefully phrased on the basis of objective fact'' exception envisioned in *Gissel*. It is not a ''demonstrably probable consequence'' that a union bargaining for the first time with a marginally profitable employer will necessarily demand ''the wages that other union members are getting''; much less is it a demonstrably probable consequence that this Respondent would have to ''just close the plant down'' merely because the Union might make such demands. Neither did Vietz make any effort to ''objectify'' his prediction by reference to any particular ''wage'' rate, nor to any specific figures associated with the Respondent's allegedly financially insecure status. Even predictions ''phrased'' far more ''carefully'' in terms of ''objective facts'' than Vietz' have not passed Board muster. Compare, e.g., *Harrison Steel Castings Co*., 293 NLRB 1158, 1159 (1989); *Crown Cork & Seal Co*.,

[36] *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), expanding *Rossmore House* teachings even where employees being questioned are not ''open and active union supporters.'' Ibid.

[37] 277 NLRB at 1217; my emphasis. And see following passages (id. at 1217–1218), wherein the majority embraced the principles announced by the Board in *Blue Flash Express*, 109 NLRB 591 (1954).

[38] Keeling testified that he thus interpreted Davis' question. By all accounts, Wheelock's dismissal, and the near simultaneous appearance of the Union's Harum at the plant earlier that day, had created a buzz of comment and speculation among the employees and supervisors about these events and about the organizing events in preceding days, during which I deem it probable that Wheelock's name became known even to the previously uninitiated as one of the central in-plant organizers for the Union. Thus, ''Who else'' likely meant ''Who else beside Wheelock.'' But considering the now-public shop gossip about all these things, Davis' ''Who else'' question does not, in itself, establish any predischarge knowledge on Davis' part of Wheelock's union activities. The same considerations apply to Hoffman's similar ''who else'' remark, described next.

255 NLRB 14 (1981). I thus conclude that when Vietz' predicted a shutdown, the Respondent violated Section 8(a)(1).

E. *Weber-Keeling (About July 28)*

Facts: ''[W]ithin two days after'' Wheelock's discharge, Keeling and Weber were working together to fix a broken freeze tunnel system called the ''Cloudy.'' Keeling, explaining that he was trying to convey the impression to Weber that he ''didn't want nothing to do with [the Union],'' asked Weber ''what would happen if the union came in.'' Weber replied, ''[I] would close down the plant.''

Conclusions: This was not even a ''prediction,'' coming from the man with the power to act, much less was it ''carefully phrased.'' It was an unadorned shutdown threat by the company president. It does not matter that Keeling invited Weber to comment, or that Keeling may have had ulterior purposes in inviting Weber's comment. The impact was no less coercive. The Respondent, through Weber, violated Section 8(a)(1).

F. *Vietz-Weber-Harder (About August 2)*

Facts: Refrigeration mechanic Harder was a card signer who, with Wheelock and others, had attended the meeting in Harum's office in Moses Lake on July 25, and who had himself passed on a card to his roommate. Harder struck me as shy and embarrassed, but truthful in what he revealed, however reluctantly: ''About a week after'' Wheelock's discharge, Harder was in Vietz' office, talking ''business.'' For no initially disclosed reason, Vietz eventually asked Harder to go to ''Kevin's'' office with him. Immediately before they entered Weber's office, Vietz asked Harder if he ''went to the meeting.'' Harder said, ''Yes,'' and Vietz asked him if he was ''for or against the Union.'' Weber replied that he ''wasn't real sure,'' that he ''went to the meeting to see what it was about.'' After the two joined Weber in the latter's office, there was a similar exchange, followed by a request from either Vietz or Weber for the names of ''who went to the meeting.'' Harder, uncomfortable in describing these details, eventually testified, ''I think I told him who had went.'' He also recalls that Weber then said that ''if the union came in, he would probably have to close the plant.'' At some later point, Harder ''volunteered'' (his word) to ''get his card back from the Union,'' to which Vietz and/or Weber responded that this was a ''good idea,'' but that they ''didn't want to push him.''

Conclusions: Previous interrogation analyses are fully applicable, but the context was inherently more coercive in that the questioning occurred within a locus of managerial authority, and was accompanied by an unlawful shutdown threat. In each instance the Respondent violated Section 8(a)(1). In the coercive surrounding circumstances, moreover, I find that Weber's and Vietz' encouraging of Harder to ''get his card back'' independently violated Section 8(a)(1). The fact that Harder initiated the subject by ''volunteering'' to do this does not mitigate in the Respondent's favor when its interrogations and shutdown threats had a plain tendency to coerce Harder in the first instance into making such a ''voluntary'' offer.

G. *Weber-Stansbury (About August 10)*

Facts: ''About two weeks'' after Wheelock's discharge, production forklift driver Stansbury happened to be in Weber's office discussing plant maintenance matters. Weber asked Stansbury if he he had ''heard about the union.'' Stansbury replied that he had, and volunteered that he had signed a card. There followed an exchange in which, piecing together Stansbury's testimony, Weber apparently got across the message to Stansbury that Weber, too, would have signed a card if he had been in Stansbury's shoes, and if he had heard from the Union only the ''good things,'' but not the ''bad things'' about unions.

Conclusions: Until questioned by Weber and volunteering that he had signed a card, Stansbury was not shown to have been the type of ''open'' union adherent envisioned in *Rossmore House*. Weber's unsolicited question was not casual nor isolated nor a mere conversation opener; it was part of a surrounding pattern of coercive intelligence gathering, and it was uttered by the company president, in the company president's office. The Respondent, through Weber, violated Section 8(a)(1).

IX. CONCLUDING DISCUSSION CONCERNING WHEELOCK'S DISCHARGE

As noted at the outset, this is a case where the striking timing of the discharge—within days of Wheelock's initiation of the organizing effort—and the plain evidence of the Respondent's antiunion animus—revealed mostly in the immediately preceding section—combine to establish most, but not all, of the elements of proof needed to make a prima facie showing that Wheelock's discharge was union motivated. I have identified the principal circumstances which I regard as reliably establishing the additional element of predischarge knowledge. The General Counsel has therefore made out a prima facie case that Wheelock was discharged for his union activities. And it thus fell to the Respondent under *Wright Line* to ''demonstrate'' that it would have discharged Wheelock even in the absence of his union activities.

I will not dwell on any evidence showing that Weber had been displeased enough with Wheelock to have come close to firing him on or about July 10.[39] The fact is, Weber did not then do so, but decided instead to give Wheelock ''another chance.'' Clearly in these circumstances it fell to the Respondent to demonstrate that, *after* July 10, Wheelock had in some new way demonstrated some defect in performance or attitude which would plausibly amount to a ''last straw.''

Admittedly, against the undisputed background evidence that Wheelock was on thin ice with Weber even before he approached the Union, the Respondent's *Wright Line* burden would not be especially weighty, requiring substantial evidence only of at least one, post-July 10, last-straw incident. And it is thus striking that Weber was so vague on this point when given the chance to make just such a ''demonstration.''

[39] Similarly, I will not find it necessary to detail the evidence introduced by the General Counsel to rebut any claims that Wheelock was guilty of pre-July 10 misconduct. It does not matter to the analysis that Wheelock may have had good ''excuses'' for the actions which had aroused Weber enough by July 10 to strongly consider firing him, until dissuaded by Vietz.

This is all that he said when examined by his attorney on the point:

> as the week or two went on there [after July 10] we kept getting the same reports that he wasn't doing his job and trying to stay where he wasn't . . . visible for somebody to get him to help if something broke. And so one day I said I think we've had enough, he's getting the rest of the mechanics to have this lazy attitude. So I said it's time to just get rid of him. So that's what Don did.

If this had been all that Weber had said on the point, I would quickly find that such dubious generalities did not amount to a ''demonstration'' sufficient to carry the Respondent's *Wright Line* burden. But the General Counsel gave Weber further opportunity on cross-examination to clarify the picture, and he did, somewhat. Thus,

> Q. [By Mr. Sand] And . . . you had further reports that Mr. Wheelock was not doing his job?
> A. That's right. The reason we—
> Q. No, let me stop you. From whom did you have such reports?
> A. From his co-workers—
> Q. No, from whom? What was the name of any individual who spoke to you—
> A. Rick Edwards, Jack Brown.
> Q. Who's Jack Brown?
> A. He's one of the fabricators.

Pressed further by the General Counsel, Weber would not say when he talked to Brown (''I can't recall the exact date.''), and could not say where he might have talked to him, except, ''Most likely in my office or when I went down to see what he was working on.'' The General Counsel pressed on, asking what it was that Brown had told Weber. Weber replied: ''That Mr. Wheelock has been hanging around back there where there was nothing for Mr. Wheelock to be doing.'' The General Counsel further invited details about any reports made by Rick Edwards to Weber after July 10. Weber obliged by saying that Edwards made such reports more than once. (Again, Weber could not recall ''exact dates,'' or locations ''most likely in the shop''), but, invited by the General Counsel then to describe the reports,, he said,

> That [Edwards] had walked by the refrigeration room and seen Earl sitting there with his back to the door looking up to the ceiling. And Rick said he stood there for several minutes before hollering at Earl that maybe he ought to go find something to do.

The General Counsel called for yet more details, and Weber again obliged, clarifying that these reports from Edwards came after the ''piler'' incident, and that Weber had, in turn, discussed these matters with Vietz. And, shortly after (precisely when remains unclear), Weber directed Vietz to fire Wheelock.

I will not prolong this with further detailing of the General Counsel's efforts thereafter to ''rebut'' these will-of-the wisps. It is clear that Vietz and Weber told quite different, or in some cases, more elaborate, stories when they gave affidavits to the Board during the investigation stage. But this is scantly as important as the fact that I simply did not believe Weber, not even when he furnished such ''details'' as he mustered during the General Counsel's questioning. His testimony seemed from his demeanor to have been entirely improvised on-the-spot. Further, the Respondent's failure to call Vietz or Edwards is damning—their absence from the witness stand[40] invites an inference adverse to the Respondent, that their testimony would have undermined the defense undertaken by Weber, alone, including the few explanatory claims that Weber did eventually advance in his testimony concerning post-July 10 performance or attitude problems on Wheelock's part.[41] I thus find that the Respondent failed to demonstrate that it would have fired Wheelock even if he had never engaged in union activities. I thus conclude that when Respondent fired Wheelock, it violated Section 8(a)(3) of the Act, and, derivatively Section 8(a)(1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The violations of Section 8(a)(1) and (3) require that the Respondent be ordered to post a remedial notice to employees. And, because the Respondent discriminatorily discharged Wheelock, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The Respondent, Basin Frozen Foods, Inc., Warden, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

---

[40] After the Respondent rested without calling Vietz or Edwards, the General Counsel moved that I hold the record open so that he could call Vietz, asserting his intention to have Vietz testify to yet a different summary of the circumstances surrounding Wheelock's discharge (i.e., the one he gave in an affidavit to the Board during the investigation)—and then to show by yet additional proof that what Vietz had said out-of-court was *itself* false. I denied this motion, but allowed the General Counsel to supplement the record with Vietz' affidavit. I do not treat anything said in that affidavit (nor in Weber's own, also offered for ''impeachment'' purposes by the General Counsel) as having substantive evidentiary value to the Respondent's case. They were clearly inadmissible hearsay for that purpose. I note that these two affidavits are themselves discrepant about details, and that neither of them is easily squared with the version which Weber elected to advance at the trial.

[41] *International Automated Machines*, 285 NLRB 1122, 1123 (1987), overruling *Wayne Construction*, 259 NLRB 571 fn. 1 (1981), ''to the extent it is inconsistent.'' 285 NLRB at 1123 fn. 5.

[42] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Discharging or otherwise discriminating against any employee for supporting the Union, Teamsters Local 760, or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Making threats to shut down the plant if the Union were to become the employees' representative for collective-bargaining purposes.

(d) Encouraging employees to get their signed authorization cards back from the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Earl Wheelock immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make whole for any loss of earnings and other benefits suffered as a result of the discrimination against, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge of Earl Wheelock and notify him in writing that this has been done and that the discharge will not be used against in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Warden, Washington, copies of the attached notice marked ''Appendix.''[43] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

---

[43] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''